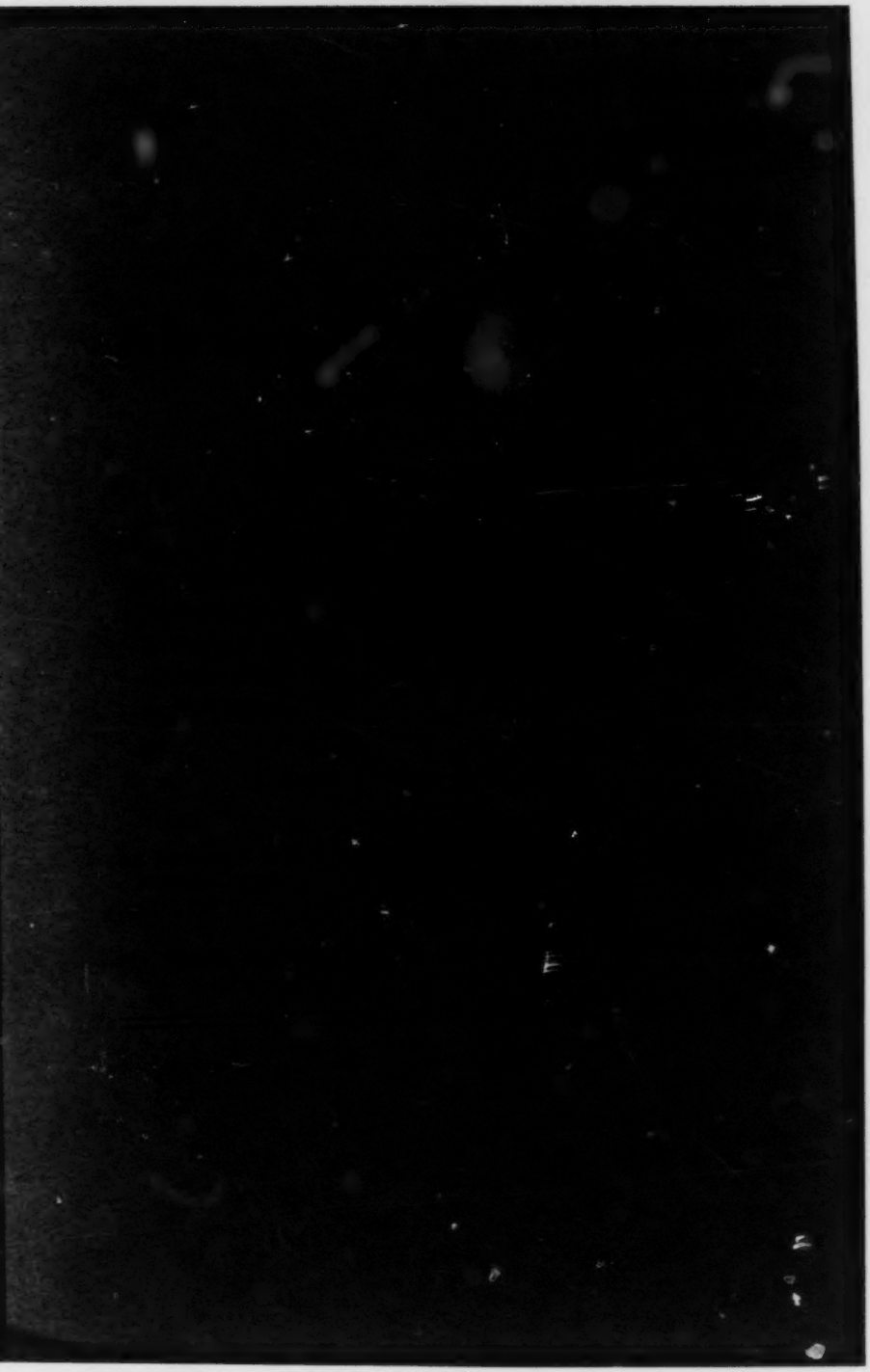

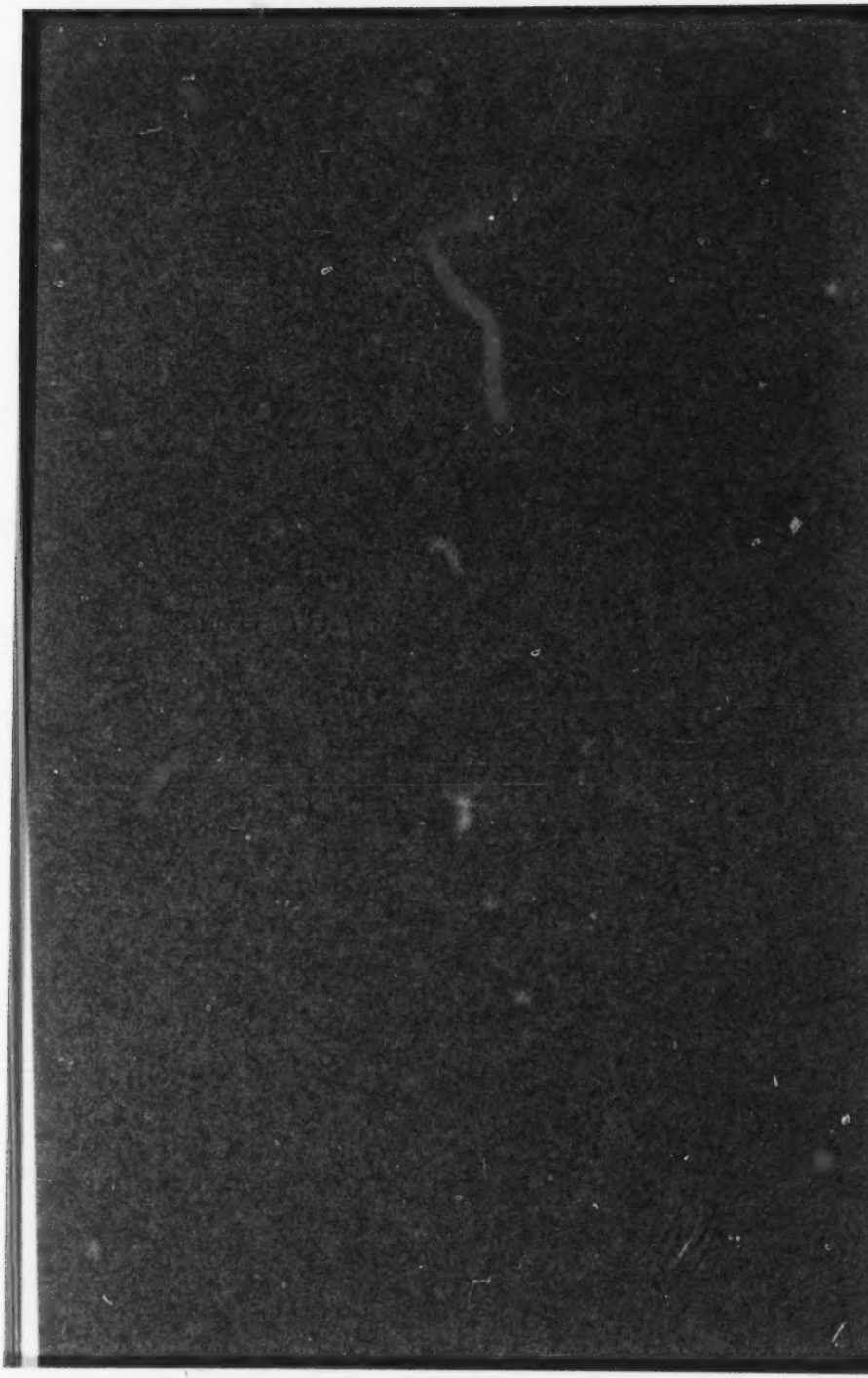

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 916

FRANK L. WEIL, WILLIAM E. RUSSELL AND RAYMOND J. SCULLY, AS TRUSTEES UNDER A DECLARATION OF TRUST DATED APRIL 7, 1936, AND A PLAN OF REORGANIZATION OF SERIES C–2 MORTGAGE INVESTMENTS APPROVED BY AN ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, ENTERED ON THE 16TH DAY OF JANUARY, 1936, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 96) is reported in 30 F. Supp. 349. The opinion of the Circuit Court of Appeals (R. 111) is reported in 115 F. (2d) 999.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 2, 1941. (R. 118.) The petition for a writ of certiorari was filed April 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Holders of securities voluntarily approved a plan of reorganization whereby certain underlying bonds were transferred to trustees for the benefit of the security holders.

The question presented is whether the transfer is subject to the stamp tax on the transfer of bonds or is exempt therefrom under Treasury Regulations 71, Article 35, as a transfer wholly by operation of law.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations are set out in the Appendix, *infra*, pp. 7–9.

STATEMENT

Prior to August 4, 1933, the New York Title and Mortgage Company engaged in the mortgage guarantee business, selling to investors certificates, guaranteed by the company, representing undivided interests in bonds and mortgages owned by the company. Among its issues was Series C–2 First Mortgage Participation Certificates (R. 3).

On August 4, 1933, by order of the Supreme Court of New York entered pursuant to Article XI of the Insurance Law of New York, the company transferred its property, including the bonds underlying the Series C–2 certificates, to the Superintendent of Insurance of New York, who took possession as Rehabilitator.[1] On May 16, 1935, the State Mortgage Commission, which had been created pursuant to Chapter 19 of the Laws of 1935 of the State of New York, took over the properties of the company from the Superintendent of Insurance (R. 4–5). On July 16, 1935, an order of liquidation was entered by the Supreme Court (R. 4).

Subsequently the Mortgage Commission, proceeding under the "Shackno Act",[2] promulgated a "plan for the readjustment, modification or reorganization of the rights of all the holders of mortgage investments represented by Series C–2 First Mortgage Participation Certificates, issued and guaranteed by" the company (R. 33). On October 10, 1935, the Supreme Court of New York entered an interlocutory order (R. 26) which recited that the modified plan would be approved upon satisfactory proof (required by the statute) that 66⅔% of the holders of Series C–2 mort-

[1] Insurance Law of New York, Sections 401, 402 (2).

[2] Section 5 (6) of the Mortgage Commission Act, and Chapter 745 of the Laws of 1933 of the State of New York.

gage investments approved the plan (R. 32). Such a showing was made and on January 16, 1936, the Supreme Court entered a final order approving the plan.

On April 6, 1936, a final order appointing the trustees under the plan was entered by the Supreme Court of New York (R. 93). The bonds underlying the Series C–2 certificates were thereupon transferred by the Mortgage Commission to the trustees (R. 5–6). It is this transfer which is in controversy. Upon it the Government assessed and collected a stamp transfer tax of $6,361.64 (R. 6).[3] The tax was paid under protest, claim for refund was duly filed and rejected, and this action was instituted (R. 7).

The District Court held that the tax was improperly assessed and collected, on the ground that the transfer was accomplished by operation of law and was therefore within the exemption accorded by Article 35 (r) of Treasury Regulations 71 (R. 96–98). The Circuit Court of Appeals reversed (R. 118–119). It held that since the approval of the plan by the Supreme Court of New York was conditioned upon the consent of the proportion of the certificate holders prescribed by statute, the transfer in pursuance of the order

[3] No tax was assessed upon the earlier transfers, to the Superintendent of Insurance and to the Mortgage Commission, it being conceded that they were "wholly by operation of law" within Regulations 71, Article 35 (r).

could not be regarded as "wholly by operation of law" (R. 115).

ARGUMENT

This case is similar to *Niagara Hudson Power Corporation* v. *Hoey,* 117 F. (2d) 414 C. C. A. 2d, which was decided by the court below in part upon the authority of the present case, and which is now pending on petition for certiorari, No. 871 this Term. Most of the contentions of the present petitioners are answered in the Government's brief in opposition in that case, to which the Court is respectfully referred.

In addition to contentions made in the *Niagara Hudson* case, the present petitioners claim exemption under Article 35 (h) of Treasury Regulations 71 (1932 edition), which provides:

> (h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law.

Petitioners urge that the various New York statutes pursuant to which the transfers occurred are to be considered as incorporated into the "trust agreement", and that the decision below conflicts on this point with *United States* v. *Merchants Nat. Trust & Savings Bank,* 101 F. (2d) 399 (C. C. A. 9th).

In the *Merchants* case, as petitioners state (Pet. pp. 14–15), "The court found that since the Cali-

fornia Banking Act was in existence at the time the trust agreement was executed, the provisions for the substitution of the Trustees, as contained in the statute, were incorporated in the trust agreement as a matter of law." Here, on the other hand, the New York statutes were not enacted until after the execution of the trust agreement. The regulation specifies "original" trust agreement, and even if subsequently enacted legislation be considered as incorporated in the trust agreement it does not constitute "terms of the original trust agreement." The word "original" was added in the 1932 revision of Regulations 71, and was not in the regulations before the Ninth Circuit in the *Merchants* case. Accordingly there is no possibility of a conflict.

CONCLUSION

For the reasons stated in the brief in opposition in the *Niagara Hudson* case and herein the petition should be denied.

Respectfully submitted.

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APRIL 1941.